

(2017) 02 BOM CK 0007
In the Bombay High Court
Case No : Writ Petition No. 73 of 2017

Kashinath Jairam Shetye

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 28-02-2017

Acts Referred:

Constitution of India, 1950 — Article 226
National Green Tribunal (Practices and Procedure) Rules, 2011 — Rule 20, Rule 21,
Rule 22, Rule 28
National Greens Tribunal Act, 2010 — Section 22

Citation : (2017) 3 ALLMR 761 : (2017) 3 MhLJ 254

Hon'ble Judges : Anoop V. Mohta and Nutan D. Sardessai, JJ.

Bench : Division Bench

Advocate : In Person, for the Petitioner; Shri P. Dangui, Addl. Govt. Advocate, for the Respondent Nos. 1, 6, 7, 9, 10, 11 and 12; Shri J.E. Coelho Pereira, Senior Advocate with Shri V. Korgaonkar, Advocate, for the Respondent Nos. 4 and 5

Final Decision : Disposed Off

Judgement

Anoop V. Mohta, J—Rule. Heard forthwith with the consent the parties. The learned Addl. Government Advocate and learned Advocate waive notice on behalf of the respective respondents.

2. The petitioner has challenged impugned order dated 10.1.2017 passed by the National Green Tribunal (Western Zone Pune)("The Tribunal") constituted with powers under the provisions of the National Green Tribunal Act, 2010("NGT Act") and the National Green Tribunal (Practices and Procedure) Rules, 2011 ("the Rules") made thereunder.

3. By impugned communication the Tribunal has rejected the application filed by the petitioners sought various reliefs on merit. Learned Senior Counsel appearing for respondent nos.4 and 5 submits that as per Section 22 of the NGT Act, a statutory remedy of appeal to the Supreme Court is available. Petitioner no.1,

who is appearing in person, conceded the provision of availability of appeal to the impugned order. However, he submitted that the application so filed before the Tribunal by the petitioner in person, not through an Advocate, has been disposed off by noting the appearance of Counsel/Advocate to whom there were instructions only to ask for time and/or adjournment. There were no instructions to appear and/or argue the matter on its merits. Section 19 itself contemplates that the Tribunal though not bound by the provisions of the Code of Civil Procedure, 1908 ("CPC") but should follow the principles of natural justice. The learned Senior Counsel appearing for respondent nos.4 and 5, however, objected to this statement/submission in the background that no such request was made and the Tribunal has passed the impugned order on merits after considering the record in the presence of the Advocate.

4. The learned Senior Counsel appearing for respondent nos.4 and 5 has placed reliance on judgment of the Supreme Court in the case of Union of India and ors v. Major General Shri Kant Sharma and anr., [(2015) 6 SCC 773] whereby the Apex Court after considering the Scheme and purpose of Articles 226 and 227 of the Constitution of India including the powers to judicial review in a matter where the statutory alternate is remedy available, has observed as under:-

"16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Supt. of Taxes and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field.

30. In Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another v. Sri Seetaram Rice Mill, (2012) 2 SCC 108, a three-Judge Bench held:

"80. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised."

5. It is relevant to note that the Apex Court in Mahanadi Coalfields Limited and others v. Dhansar Engineering Company Private Limited and another, [(2016) 10 SCC 571] after considering the position of law and the various Supreme Court Judgment has observed at para 25 as under:-

"Similarly, it is not necessary for us to burden this judgment with the decisions

relied on by the respondents, to contend that existence of alternative remedy is no bar to entertain a Writ Petition under Article 226 of the Constitution of India, as held in the cases of Popcorn Entertainment v. City Development Corporation, [(2007)9 SCC 593], Harbanslal Sahnia and Anr. v. Indian Oil Corporation Ltd and ors., [(2003) 2 SCC 107], Union of India and ors. v. Tania Construction Pvt. Ltd., [(2011)5 SCC 697], M.P. State Agro Industries Development Corpn. and Anr. v. Jahan Khan,[(2007)10 SCC 88] and Whirlpool Corporation v. Registrar of Trade Marks, Mumbai, [(1998)8 SCC 1]. For, we have already examined the merits of the controversy and more so granted liberty to the respondents to make representation to the appellants on the question of justness of the demand towards penalty or the quantum thereof. It will be open to the respondents to pursue remedy in that behalf, as may be permissible in law. We are not expressing any opinion one way or the other on the issue of penalty amount. All questions in that behalf are left open."

6. There can't be any quarrel, with this proposition of law, but at the same time we have to consider the Scheme and object of the NGT Act and Rules made thereunder and facts in hand. The Rules 20 and 21 itself provide for filing an application within 30 days for setting aside an ex-parte order and if decision is taken on merit, availability of the review within 30 days from receipt of copy of the order. These provisions are available remedy even if the statutory appeal is provided. The right so created and contemplated under those Rules including of filing the review application within the prescribed period just cannot be overlooked. Therefore, those judgments so cited, in our view, are of assistance in the facts and circumstances of the present case to entertain writ and pass appropriate order. Accepting the settled principles of law, with regard to no interference by a Writ Court, when statutory remedy is available but the same judgments contemplated and recognised the power of the Writ Court if facts and circumstances permit; so also the specific provisions of law like present-one in question.

7. The petitioner, in response to the citation referred and relied by respondent nos.3 and 4 has placed on record the judgments in support of his contention to support his submissions to consider his case on merits in Writ Jurisdiction itself.

8. We are not deciding the merits of the matter but only permitting the petitioner to invoke the remedies which are available in law.

9. We have to consider the rival contentions so raised by the parties in the background of typical facts and circumstances of the case in hand. Though the remedy of appeal to the Supreme Court is available to the petitioner, that could not be the reason not to consider the case of the petitioner so agitated in the Writ Petition by permitting him to invoke statutory remedies available as disputed facts are involved. This is in the background of the Rule 2011 specifically Rules 20, 21, 22 and 28 which are reproduced as under:-

"20 Action on application for applicant's or appellant's default:-

(1) Where on the date fixed for hearing of the application or appeal, as the case may be, or on any other date to which such hearing may be adjourned the applicant or appellant, as the case may be, does not appear when the application or appeal, as the case may be, is called for hearing, the Tribunal may in its discretion, either dismiss such application or appeal for default or hear and decide it on merit.

(2) Where an application or appeal, as the case may be, has been dismissed for default and the applicant or appellant, as the case may be, files an application within thirty days from the date of dismissal and satisfied the Tribunal that there was sufficient cause for his non-appearance when the application or appeal was called for hearing, the Tribunal shall make an order setting aside the order dismissing the application or appeal, as the case may be, and restore the same. Provided that where the case was disposed of on merits the decision shall not be reopened except by way of review.

21. Ex-parte hearing and disposal of cases:-

(1) Where on the date fixed for hearing the application or appeal, as the case may be, or on any other date to which such hearing may be adjourned, the applicant or appellant, as the case may be, appears and the respondent does not appear when the application or appeal is called for hearing, the Tribunal may, in its discretion adjourn the hearing, or hear and decide such application or appeal ex-parte.

(2) Where an application or appeal, as the case may be, has been heard ex-parte against a respondent or respondents such respondent or respondents may apply within thirty days from the date of the order to the Tribunal for an order to set it aside and if such respondent or respondents satisfy the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing when application or appeal was called for hearing, the Tribunal may make an order setting aside the ex-parte order as against him or them upon such terms as it thinks fit, and shall appoint a day for proceeding with such application or appeal:

Provided that where the ex-parte order of the application or appeal is of such nature that it cannot be set aside as against one respondent only, it may be set aside as against all or any of the other respondents also.

Provided further that the Tribunal shall not set aside ex-parte order of an application or appeal, as the case may be, merely on the ground that it was not served upon a respondent or respondents.

22. Application for review:

(1) No application for review shall be entertained unless it is filed within thirty days from the date of receipt of copy of the order sought to be reviewed.

(2) A review application shall ordinarily be heard by the Tribunal at the same

place of sitting which has passed the order, unless the Chairperson may, for reasons to be recorded in writing, direct it to be heard by Tribunal sitting at any other place.

(3) Unless otherwise ordered by the Tribunal sitting at the concerned place, a review application shall be disposed of by circulation and the Tribunal may either dismiss the application or direct notice to the opposite party.

(4) When an application for review of any judgment or order has been made and disposed of, no further application for review shall be entertained.

(5) No application for review shall be entertained unless it is supported by a duly sworn affidavit indicating therein the source of knowledge, personal or otherwise, and also those which are sworn on the basis of the legal advice.

(6) The counter affidavit in review application shall also be on a duly sworn affidavit where ever any averment of fact is disputed.

28. Communication of order to parties:

(1) Every interim order, granting or refusing or modifying interim relief or final order shall be communicated to the applicant or appellant, as the case may be, and to the concerned respondent either by hand delivery or by Registered Post, free of cost.

Provided that unless ordered otherwise by the Tribunal, copy of the final order need not be sent to any respondent who had not entered the appearance.

(2) The applicant or, as the case may be, the appellant or the respondent who is duly represented by an Advocate or other authorised agent requires a copy of any document, proceedings or order, the same shall be supplied to his on such terms and conditions on payment of such fees or cost as may be fixed by the Chairperson by general or special order."

10. The Scheme of the above provisions provides that if the applicant/petitioner fails to appear on the date of hearing so fixed, the Tribunal is empowered to dismiss the application for default and/or hear or decide it on merits. In case, it is dismissed for default, provision is available to file an application within 30 days from the date of dismissal to show sufficient cause for non-appearance. The Tribunal may consider the same, in accordance with law, and may restore the same. The provision is also available when the case is disposed off on merits, the decision shall not be reopened except by way of review. The Review, in such circumstances, is also remedy available to the applicant/petitioner. The another facet is Rule 21, an ex-parte order, can be passed, by the Tribunal as the party for some reason or another, failed to attend the hearing so fixed. The discretion is provided with the Tribunal to adjourn the matter and/or to hear the application or appeal ex-parte.

11. The aggrieved party, if ex-parte order is passed, in such circumstances, is also permitted to file application to set aside the ex-parte order within 30 days

from the date of the order of the Tribunal. If sufficient cause is made out, the Tribunal will pass appropriate order of fresh hearing and/or pass such order, after hearing all the parties. The importance of the provision itself contemplates, and specifically Rule 20, that the party aggrieved by such order on merits may apply within 30 days from the date of "receipt of the copy of the Order" for review. It is mandated that the Tribunal to entertain such application, if filed within 30 days, from the date of receipt of copy of the order. The Tribunal is further empowered to dispose off such review by following procedure so laid down and may pass order allowing or dismissing such application. Once the application of review is rejected or not entertained, there is no provision of filing second review application.

12. Taking overall view of the Scheme and the above provisions, in the facts and circumstances of the case, we are inclined to observe that the provision of appeal so contemplated that should not be hurdle for the petitioner to agitate the issue as the main grievance is that the petitioner-in-person was not heard on merits of the matter.

13. The advocate presence though recorded, that itself, should not be the reason not to grant an opportunity to the petitioner to agitate the issue on merits of the matter in the circumstances of the case. There is nothing on record to show that the said Advocate had appeared, on instructions, as contemplated under the provisions of Law with duly signed Vakalatnama. A person/third party may appear, if authorised, by the concerned party to argue or appear on the such applicant's behalf and/or for the party concerned. There is no bar. Admittedly, application was filed by the petitioner-in-person. The matter was adjourned for service. The procedure contemplates opportunity required to be given to the respondents also. In the matter no reply was filed by the respondents to contest the merits of the application with prayers so raised. There is issue that the Advocate was not authorised and/or instructed to argue the matter on merits. Considering the grievances so raised and specifically averred in the Writ Petition, including E-mail of the Advocate dated 14.1.2017 reflecting what transpired before the Tribunal before passing the impugned order in open Court on 10.1.2017. These aspects required re-hearing so that the contentions of both the parties can be considered by the Tribunal by following basic principles of natural justice. Even otherwise, if such stated ex-parte order is passed, provision is available for the concerned party to seek for setting aside the order within prescribed period. So also, is the provision for filing the review. The Tribunal is provided and permitted to entertain such application in accordance with law. Remedy, even if available by way of statutory appeal, in the background, therefore, should not be the reason to deny other remedies available under the NGT Act and Rules made thereunder.

14. Therefore, for the above background we are decline to accept the Preliminary Objection about the availability of the statutory appeal as only remedy as contemplated under Section 22 of the NGT Act, but inclined to accept the

submission that alternate remedy is available to the petitioners.

15. The petitioners are required to file review within 30 days from the receipt of the copy of the order. There is nothing on record to show that he had actually received the copy as forwarded by the Tribunal in accordance with the Rules, so prescribed. It is also not the case that the counsel appearing for the respondents, immediately on the date of the order so passed, applied for a certified copy and obtained the same to prefer the present writ petition or file an review or application setting aside the ex-parte order. Whether it is ex parte or not is also again the matter which the Tribunal, in a given case may consider specifically when the Advocate was instructed only to pray for adjournment. There is nothing on record to show, unless specifically recorded or found on record of the Tribunal, that Advocate appeared with Vakalatnama and with specific written instructions. On instructions, if third party appears only for sought adjournments and the Tribunal, if passes the order, on merits, this could definitely cause injustice to the person who was appearing in the matter in person. As the proceedings reflect that the petitioners normally appeared in person and argues his own matters. The Tribunal though uploaded the order and made available the copy immediately on the date of the order, that itself, cannot be a reason to say that, that amounts to receipt of copy of the order so passed by the Tribunal. The procedure prescribe for receipt of copy of the order needs to be considered in the background of giving fair opportunity to the party who wants to prefer the statutory appeal/review. The requirement of authorised or authenticated copy or certified copy for taking such steps to raise challenge just cannot be overlooked. In the given case, even for an ex-parte and/or interim order was passed, the requisite certified copy is required. Normally a requisite/ authenticated/certified copy is a must. Therefore, in the present case merely because the petitioner has filed copy of the order in the Writ Petition record, it cannot be a reason to accept the case that this amounts to receipt of the copy of the order as contemplated for filing review under the Act or Rules made thereunder.

16. In the present case, the petitioner after receipt of the copy of order (not certified) dated 10.1.2017 even, if any, has preferred the present Writ Petition on 17.1.2017. The review application and/or application for setting aside the ex-parte order should have been filed before 14.2.2017. This matter is listed today. We have heard the parties finally.

17. We are inclined to permit the petitioner to take appropriate steps including filing of the applications as contemplated under the Rules within two weeks from today. The Tribunal to consider the same, in accordance with law, on merits, keeping in mind the fact that the petitioner filed present writ petition in this Court immediately on 17.1.2017.

18. The submission raised by the learned Senior Counsel appearing for respondent nos.4 and 5 that aspect of limitation be kept open for the Tribunal to adjudicate after considering the provisions of the NGT Act and the Rules. There is

no specific provision available whereby the Tribunal is empowered to condone delay, if application is filed beyond 30 days from receipt of copy of the order. In the absence of such provision, we are inclined to observe that, the Tribunal, if not empowered, to condone the delay and pass appropriate order considering the Scheme and purpose of the Act. Therefore, in the present facts and circumstances recorded above and noting the principle of natural justice, apart from the basic principle of passing order on merits after hearing the parties concerned, as it goes to the root of the matter, we are inclined to condone the delay if any. As such there is no delay.

19. We are not dealing with the merit of the matter but only permitting the petitioner to agitate his grievance including the issue of instructions or no instruction to the Counsel who had stated to have been appeared on behalf of the petitioner and further the decision so taken on the merits of the matter, as stated without hearing the petitioner in person. Therefore, we are inclined to permit the petitioner to file review application or such application within 15 days and the Tribunal shall consider the same expeditiously, on merits in accordance with law.

20. It is made clear that we have not decided the issues on merit. The Tribunal to pass appropriate order after hearing the rival contentions of the parties on its own merits. Petition is accordingly dismissed by passing the following:-

ORDER

(i) The petitioner to file appropriate application/review application within 15 days and the Tribunal shall consider the same expeditiously, on its own merits, in accordance with law. All contentions are kept open on merits of the matter.

(ii) Writ Petition is disposed off accordingly, with no order as to costs.